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May 19, 2016

The Honorable Thomas J. Wheeler
Chairman, Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Dear Chairman Wheeler and Members of the Commission:

The Commission's recent Notice of Proposed Rulemaking to inject competition into the set top box marketplace is laudable in its objective. I commend you for addressing this important issue. However, similar to any proposal designed to make substantive changes within an established industry, a number of potential concerns have been raised by the affected stakeholders. As the video marketplace is a competitive and innovative environment, I ask how the Commission's proposal will address these concerns.

Protecting intellectual property through copyright is essential to ensuring the television industry continues producing new and unique programming for consumers. This programming is centered upon a contractual relationship that governs content, advertising, and channel placement. However, concerns have been raised that third parties will not abide by the terms of the negotiated contract under the Commission's proposal. I ask how third parties will be affected by the negotiated contractual relationships between content providers and multichannel video programming distributors (MVPD).

Programmers also rely on licensing agreements they make with television providers to ensure the security of their content and safeguard against piracy. Therefore I also ask what protections are in place within the Commission's proposal to ensure that third parties will abide by any content security provisions in programmers' agreements with MVPD providers.

Consumers from diverse communities depend on minority programmers for coverage of issues that are specifically important to them. Their interests sustain minority-owned programming, and any proposal should encourage a more diverse array of voices. Therefore, I ask what affect the Commission believes the proposal will have on minority programing, and I further ask what other efforts are being made to encourage additional minority voices in broadcasting.

Thank you for your attention to this important matter and for answering my questions. If you have any questions, please feel free to contact me or my Counsel Andrew Geibel at 202-224-4744. I look forward to working with you to ensure the Commission's policies support a competitive industry in which intellectual property is protected and companies are encouraged to create diverse and high quality content for consumers.

Sincerely,



Robert Menendez
United States Senator



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

July 11, 2016

The Honorable Robert Menendez
United States Senate
528 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Menendez:

Thank you very much for your letter regarding how the Commission's proceeding for better fostering competition in the set-top box and navigation app marketplace might impact the legal rights of copyright owners and creators, the content security measures used by pay-TV providers, and minority and independent programmers. I take your input on these issues seriously and assure you that it will receive careful consideration.

Section 629 of the Communications Act, adopted by Congress in 1996, requires the Commission to promote competition in the market for devices that consumers use to access their pay-television content. Yet, unfortunately, the statutory mandate in section 629 is not yet fulfilled. The lack of competition in this market has meant few choices and high prices for consumers. In a recent Rasmussen Report Study, 84 percent of consumers felt their cable bill was too high. One of the main contributing factors to these high prices is the no-option, add-on fee for set-top box rental that is included on every bill, forcing consumers to spend, on average, \$231 in rental fees annually. Even worse, a recent congressional investigation found that the price of most equipment fees is determined by what the market will bear, and not the actual cost of the equipment.¹ With the lack of competition in this market, it should come as little surprise that fees for set-top boxes continue to rise.² Clearly, consumers deserve better.

This February the Commission put out for public comment a proposal that would fulfill the statutory requirement of competitive choice for consumers. This action opened a fact-finding dialog to build a record upon which to base any final decisions. Our record already contains more than 280,000 filings, the overwhelming majority of which come from individual consumers. FCC staff is actively engaged in constructive conversations with all stakeholders—content creators, minority and independent programmers, public interest and consumer groups, device manufacturers and app developers, software security developers, and pay-TV providers of all sizes—on how to ensure that consumers have the competition and choice they deserve. I am hopeful that these discussions will yield straight-forward, feasible and effective rules for all.

¹ U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS COMMITTEE, MINORITY STAFF REPORT, *INSIDE THE BOX: CUSTOMER SERVICE AND BILLING PRACTICES IN THE CABLE AND SATELLITE INDUSTRY*, 17 (Jun. 23, 2016).

² One recent analysis found that the cost of cable set-top boxes has risen 185 percent since 1994 while the cost of computers, television and mobile phones has dropped by 90 percent during that same time period.

You raised questions about how this proceeding might affect the legal rights of copyright owners and creators. The FCC's authority to regulate communications has always existed alongside content owners' rights to control the duplication, distribution, or performance of their works. Starting with broadcast, and continuing with cable, satellite and the internet, the FCC has for more than 80 years regulated networks that content owners use to transmit their works to the public. In these activities, the Commission has always recognized the statutory rights of content owners and has pursued policies that encourage respect for these rights. In addition, several FCC-related statutes explicitly prohibit the alteration of broadcasts or the theft of cable transmissions that contain copyrighted works.

I share your goal of ensuring that the marketplace of legal copyrighted works is not harmed by our proceeding. And I am confident that these FCC-specific authorities and well-practiced contractual arrangements will continue to safeguard the legitimate interests of all of the participants in the video ecosystem. We have seen this work in the cases of the statutory regime governing must carry and of the essentially contractual regime governing retransmission consent, for example.

The goal of this rulemaking is to promote competition, innovation and consumer choice. I can assure you that we do not seek to alter the rights that content owners have under the Copyright Act; nor will we encourage third parties to infringe on these rights. All of the current players in the content distribution stream, including cable and satellite companies, set-top box manufacturers, app developers, and subscribers, are required to respect the exclusive rights of copyright holders. The rulemaking will require any companies that enter this market subsequent to our action to follow the same requirements.

I also share your interest in ensuring that we do not interfere with the licensing agreements and contractual arrangements between pay-TV providers and programmers. Licensing agreements in particular are used to establish usage terms for content that falls outside of the protections afforded by federal copyright law. I believe that such provisions should remain protected, and we are actively seeking input from the programming community on a number of methods to accomplish this.

While the protection of artistic work and the promotion of technological innovation may be presented as conflicting values, I believe that in many situations these two important policy goals can complement each other. While many people feared that the Sony Betamax would harm the ability of content owners to earn money through films and television, it actually created a brand new and profitable market – the videocassette and later the DVD market – for content owners. Our rulemaking will ensure that this rapidly-changing industry continues to strike the proper balance between property rights and consumer choice. None of us can predict exactly what the video marketplace will look like 10 or 20 years from now, but the goal of this rulemaking is that it will be a healthy ecosystem that supports a wide variety of diverse content and gives consumers many convenient ways to purchase and view this content.

I believe that we can foster competition that will improve consumer choice while respecting and protecting the exclusive rights of content creators. This is also the opinion of the Writers Guild West, who concluded the following in one of its filings in this proceeding: “[t]he proposed rules for a competitive navigation device market are a logical and necessary next step in giving consumers more choice and further opening the content market to competition. While fears of piracy have been raised in this proceeding, the WGAW’s careful analysis is that the Commission’s rules can promote competition *and* protect content.”³

You also raised questions about how this proceeding will ensure anti-piracy protections remain in place. Our proceeding will protect the role of digital rights management (DRM) platforms in the television ecosystem. DRM platforms offer rigorous protection against unauthorized copying and other violations of content owner rights. Importantly, DRM platforms are not developed by content owners or MVPDs, but rather, by businesses with expertise in DRM. Some of the more popular solutions currently on the market are Microsoft PlayReady and Adobe Primetime. The Notice of Proposed Rulemaking adopted by the Commission in February proposed that content owners would remain free to select the DRM platforms that they prefer. Developers of competitive apps and set-top boxes would license the DRM technology and satisfy compliance requirements – in the very same way that current set-top boxes support DRM, and the same way that competitive apps and devices already support DRM for online video.

Finally, you also raised questions about how this proceeding would affect minority programming and what other efforts are being made to encourage additional minority voices in broadcasting. I share your goal of supporting and promoting diverse and independent voices in our media landscape. Competition in the market for accessing pay-TV content will further this goal. As the video ecosystem evolves it should be creating more opportunities for independent and minority-owned programming. Thus far, our record is replete with comments from minority programmers who have been locked out from carriage on traditional cable networks.⁴ While the

³ Writers Guild of America, West Reply Comments, MB Docket No. 16-42, CS Docket No. 97-80, at 15 (May 23, 2016).

⁴ See, e.g., New England Broadband Comments, MB Docket Nos. 16-42, 97-80, at 2 (Apr. 22, 2016) (“On behalf of the dream that was the Black Education Network and on behalf of all of the other generations of quality programming strangled to demise by a merciless cable system, I enthusiastically applaud the FCC’s efforts to unlock the box!”); GFNTV Comments, MB Docket Nos. 16-42, 16-41, 97-80, at 2 (Apr. 22, 2016) (“Fortunately, the FCC has the ability to create this opportunity for independent and minority programmers -- but it must act soon before cable operators can set the only gatekeepers to this online video market. We need a path to greater distribution of this content and the way to do this is to have a competitive set top box or no set top box system. Online video minority programmers will not be able to grow and thrive with the current system.”); BLQBOX Comments, MB Docket Nos. 16-42, 16-41, 97-80, at 1-2 (Apr. 22, 2016) (“So why should minorities —or anyone else— care about this fight? Because as a battle wages on #OscarsSoWhite, there are hundreds of thousands of hours of quality programming —documentaries, shorts, lifestyle, indie movies, global movies —that don’t fit well within the traditional ad-based TV model and will never make it onto broadcast, cable or even Netflix and Amazon. And for those content creators and the entrepreneurs who want to distribute that work, the only viable market is direct to consumers in the streaming world. But as long as the streaming world is locked out from the mainstream, many audiences will never find them and they will not succeed. Set-top box innovation would open that system.”); The Townsend Group Comments, MB Docket Nos. 16-42, 16-41, 97-90, at 2 (Apr. 22, 2016) (“Unless we eliminate the gatekeeper system, we will forever be just talking about how to improve markets for independent and diverse

most popular MVPD packages contain 200 to 500 channels, there are currently only two Hispanic-owned and four African-American owned networks available on most MVPDs.

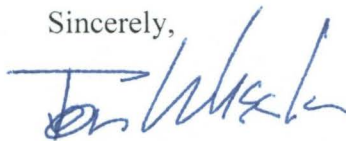
Not only is there limited carriage, but there is also limited financial support for minority-owned networks. While a channel like ESPN is paid over \$7.00 per month per subscriber by MVPDs, minority channels receive pennies. What's more, minority networks are often placed on premium tiers requiring an additional payment from the consumer which also limits potential advertising revenues by limiting potential audience reach.

Our goal is to provide minority and independent programmers with an equal opportunity to reach their audiences. By facilitating competition in interfaces, search functions, and integration of programming sources, we will provide programmers with a greater ability to find audiences and consumers with a greater ability to access independent and minority programming. For those few independent and minority-owned programmers who already have carriage on the traditional pay-TV system, nothing in the Commission's proposal disrupts existing contractual relationships between programmers and MVPDs.

The Commission also adopted a Notice of Inquiry (NOI) early this year to examine the state of independent and diverse programming. This NOI fits hand-in-glove with the set-top box and navigation app proceeding; both are about expanding the diversity of choice. Through the NOI, we solicited comments on the principal challenges independent video programmers face in gaining carriage of their content on both traditional and emerging distribution platforms. This conversation will help the Commission assess the current state of video programming diversity and determine what next steps we must take to promote independent programming sources.

The record we are developing in these proceedings will help us preserve strong copyright and content protections while delivering American consumers meaningful choice and opening new opportunities for minority and independent programmers. Thank you for your engagement in this proceeding, and I look forward to continuing to work with you on this important consumer issue.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tom Wheeler", is written over the word "Sincerely,".

Tom Wheeler

programmers. The proposed Unlock the Box regulations significantly lower barriers to market entry for diverse and independent programmers. In addition, the proposal represents a positive evolution in our video-programming ecosystem bringing us closer to the non-gatekeeper system we deserve. I urge the FCC to move deliberately implementing this proposal and finally establishing a cable marketplace that lives up to its potential.”); UNIFYme.TV Comments, MB Docket Nos. 16-42, 16-41, 97-80, at 2 (Apr. 22, 2016) (“Unlock the Box gives audiences easy access to diverse programming from streaming services like UNIFY and other content providers who have been shutout from cable outlets. Cable and satellite stations have been gatekeepers who have invariably dismissed so much rich content and deprived audiences from experiences of old and/or new content.”).